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Nos. 04-1704 and 04-1724

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IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION,
*Petitioner*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

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WILLIAM W. WILKINS, *et. al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3.

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## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAIN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America as *amici curiae* in support of petitioner.

## INTEREST OF *AMICI CURIAE*

The three *amici curiae* who have joined to file this brief are trade associations that represent the largest investors in our nation's state and local economies. Between the three organizations, every major business interest is represented.[1]

The Council On State Taxation ("COST"), is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive, and most COST members have utilized investment tax credits. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties have been obtained and filed with the Clerk of the Court.

federation. With a substantial presence in all fifty states and the District of Columbia, the U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American business, the U.S. Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

Each of the *amici* serve business memberships that are directly impacted by the reasoning and the result reached in this case; the legal, political and economic ramifications of the Court of Appeals' decision are already reverberating for both governmental and commercial entities through the Sixth Circuit and nationwide. Hence, each of the *amici* have a vital interest in the proper disposition of this case.

The *amici* and their respective members constitute a broad swath of companies that are in a position to dramatically impact our subnational economy through new and continued investment that is designed to enhance economic development. These companies have physical presence in Ohio, each of the other Sixth Circuit states, and nationwide. This presence is associated with activities that enhance our Gross Domestic Product; generate taxable receipts and net income subject to all levels of governmental tax jurisdiction; create and improve the economic prospects for individual Americans; and promote the vitality of American communities. This presence is created through substantial capital investment by such companies, and it is sustained through continuing investment by the same companies.

## SUMMARY OF ARGUMENT

Tax incentives, similar to the Ohio investment tax credit struck down by the Sixth Circuit Court of Appeals, are an important feature of state taxation. Specifically, they operate as part of an overall tax structure to mitigate tax increases that often result from increased in-state activity. Further, tax-

payers and tax jurisdictions significantly rely on the continued availability of state tax incentives; the Sixth Circuit's decision has sent taxpayers and taxing jurisdictions down a path of confusion and only this Court can restore the stability and certainty that is desperately needed.

The constitutional analysis adopted by the Sixth Circuit is flawed. "Tax-neutral decision making," as applied by the court of appeals, is an unworkable standard. Nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Further, the court's application of "tax-neutral decision making" unjustifiably leads to different results. For instance, a taxpayer with a preexisting Ohio tax liability is, under the court's theory, "coerced" by the investment tax credit into expanding in Ohio, while another taxpayer without a preexisting Ohio tax liability is not. Meanwhile, both taxpayers would be seeking the same tax benefit—an Ohio franchise tax credit available to offset *future* Ohio tax. This differing result proves that the court's utilization of the "tax-neutral decision making" standard is unworkable. This Court should grant the petition for writ of *certiorari* and overturn the Sixth Circuit's application of the "tax-neutral decision making" standard.

## ARGUMENT

The question presented in this appeal is whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3. However, the ramifications of this appeal are not limited to tax type, tax jurisdiction, or taxpayer.

The *amici* are uniquely positioned to know and assess the prevalence and potential economic value of incentives such as those offered by the State of Ohio (an investment tax credit against Ohio's corporate franchise tax). The companies that

make such capital investments are offered a vast array of tax and non-tax credits and incentives.[2] Some of these require affirmative action by the taxpayer (*e.g.*, application or submission of an investment plan) in order to qualify for such incentive; some are automatically available by operation of statute if the taxpayer meets certain enumerated criteria. Regardless of the administrative features of a tax incentive, many corporate taxpayers that qualify for incentives score their value highly and are required to accurately reflect their value in financial statements, estimations of effective tax rates, and assessments of return on investment.

The rationale for tax incentives is no mystery to any beneficiary of economic development initiatives. The direct beneficiaries of incentives include the corporate recipients of tax incentives; the employees and commercial partners of such corporations; the families of such employees; and the communities that accrue infrastructural benefits of "run-off" investments and commercial development (*e.g.*, retail, dining, entertainment and personal services establishments, all of which entail additional employment and payment of taxes). States and localities substantiate the use of tax incentives on a variety of grounds: to attract and to reward new investment, as well as continued investment in pre-existing plants, facilities and equipment; to replace other manufacturing and commercial enterprises that no longer provide an equivalent economic base; to compete with other localities that wish to entice economic investment within their borders; and to compete on an international playing field for these same capital expenditures.

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[2] "All states offer some form of incentives. In addition, most local governments offer incentives. These incentives may come in the form of tax reductions or abatements, financial assistance, or infrastructure grants or refunds." *Business Incentives Guide* (CCH) ¶ 105 (2005).

The memberships of *amici* can attest to the fact that the enactment of incentives also finds its justification in the mutually beneficial experience of both governmental authorities and corporate enterprises. Qualification for the typical tax incentive is premised upon the applicant meeting certain threshold levels of investment, and incentives are often explicitly premised upon the applicant maintaining a fixed level of employment, capital investment, or other economic indicia of significance to the jurisdiction that offers the incentive. Thus, while the jurisdictions that offer incentives have provided an economic benefit to the recipients of same, they also ensure that the benefits equation will balance over time. In this regard, many state and local tax incentives are drafted so as to "claw back" the incentive (*i.e.*, reverse the tax effect of an incentive that was previously taken by a corporate taxpayer), if the corporate taxpayer is determined on a retroactive basis not to have met its statutory or regulatory commitments during the period to which an incentive pertained.

The potential loss of state and local jurisdictions' ability to provide incentives, and of taxpayers' ability to utilize incentives, would have dire ramifications. First, there would be a loss of economic investment and activity to various foreign countries; and the investment made by foreign manufacturers in the United States would likely also dissipate. Second, the court of appeals' decision would undermine the United States' federal tax policy of providing incentives.[3] Third, there would be significant financial statement impacts on those companies that had been reflecting their entitlement to incentives in their calculations of profitability; the corre-

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[3] *Cf.* 26 U.S.C. (Internal Revenue Code) § 199, "Income attributable to domestic production activities" (this provision allows an income tax deduction associated with certain U.S.-based production activities), and § 965, "Temporary dividends received deduction" (this provision allows an income tax deduction for repatriating certain foreign dividends that will be invested within the U.S.).

sponding creation of confusion in the financial markets should not be underestimated.

In the current uncertain environment created by the decision of the court of appeals, the involvement of this Court is needed to re-stabilize the environment and reduce litigation costs. The court of appeals' decision has sent taxpayers and state and local government down a path from which there is no turning back. Unless this Court grants review, there will be unavoidable confusion, uncertainty and rampant litigation regarding the availability of state tax incentives. Further, the uncertainty created by the breadth of the Sixth Circuit's decision has already begun to impact the ability of those states to compete for investment and expansion of business. Without review of the issue by this Court, the Sixth Circuit states will continue to suffer this disadvantage while the issue festers through years of litigation in other states.

### A. The Court of Appeals' Decision Upsets Settled Expectations and the Reasonable Reliance Interests of Taxpayers, Jurisdictions that Offer Incentives, and Others.

All parties to this benefits equation have long-settled expectations that their mutual commitments would be respected and upheld. Most large companies have reasonably relied on the plethora of tax incentives that are today available in all 50 states and many localities. The indicia of such reliance are undeniable. They include, but are certainly not limited to, negotiations/contracts with state economic development agencies and revenue agencies; the design and implementation of capital investments that will qualify for particular state and local tax incentives; the reflection of such expenditures on tax returns (e.g., positions and disclosures), the maintenance of work force in place, and investment in employee training. Based as well on the actions of their counterparts, companies may reasonably rely on these incen-

tives; state legislatures, state executive branches, state revenue departments and local governmental entities have designed, implemented, and administered the incentives in concert, over the course of many years.

Likewise, state and local governments have reasonably relied on the availability of a variety of tax incentives to attract and retain businesses, especially in economically disadvantaged areas. State and local governments must develop and enact budgets annually. These budgets often are dependent upon estimates of tax revenues and expenditures. A critical component for many state and local jurisdictions in developing reliable budget estimates is reasonable reliance on commitments derived from tax incentive arrangements. Striking down common tax incentives, like the Ohio investment tax credit, undoubtedly will upset the stability of budgets in a substantial number of jurisdictions.

Investors have also come to expect that this kind of common investment incentive is, and has long been, constitutional. While the Court has consistently struck down discriminatory tax provisions,[4] the investment tax credit that was struck down in *Cuno* is different and does not unconstitutionally discriminate. First, a nondomiciliary taxpayer

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[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) (overturned New York transfer tax imposed at higher rates on sales of stock occurring on non-New York exchanges); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (overturned Louisiana first-use tax on natural gas that applied to all purchases except those by Louisiana consumers, due to exemption/credit scheme); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (overturned Hawaii wholesale excise tax on liquor that exempted locally produced pineapple liquor); *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983) (overturned New York franchise tax credit for DISCs that was subject to reduction to the extent that DISC makes export sales from non-New York locations); *Associated Ind. of Missouri v. Lohman*, 511 U.S. 641 (1994) (overturned Missouri use tax on interstate sales that was imposed at occasionally higher rates than sales tax on intrastate sales).

and state/local government representatives are seeking *jointly* to overturn the decision. This case is unlike any other case where this Court has considered whether a state tax provision violates the Commerce Clause. This unusual alignment of interests evidences the commonly held view that the Ohio investment tax credit, and others like it, are valid.

Second, tax incentives encourage economic growth; they do not discriminatorily limit growth. In this regard, the Ohio investment tax credit and analogous incentives are consistent with the fundamental purpose of the Commerce Clause and this Court's decisions: to ensure the free flow of goods among states and to ensure that states do not engage in economic protectionism.[5] Further, they are not intended to, and do not in fact, erect economic barriers between the states for the reasons set forth below.

Nearly every state provides some form of investment tax credit, which is tailored to the individual state's needs and economic priorities. The Ohio investment tax credit, like many other tax incentives, does not contain discriminatory prerequisites to qualification, nor is the credit reduced or eliminated as a result of an increase in out-of-state activity by a recipient of the tax credit or any other person. For instance, the Ohio investment tax credit is not limited to companies incorporated in the state—any company (regardless of state of incorporation or domicile) that chooses to invest in the

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[5] *See, e.g., Associated Ind. of Missouri v. Lohman*, 511 US 641, 647 (1994): "The [Commerce] Clause prohibits economic protectionism--that is, 'regulatory measures designed to benefit in state economic interests by burdening out of state competitors.' *Id.*, at 273-274. Thus, we have characterized the fundamental command of the Clause as being that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,' *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), and have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)."

statutorily prescribed fashion may qualify for the Ohio credit. Other types of state tax provisions complement the adoption of tax incentive measures; for example, the significant adoption by states of single sales factor apportionment formulas[6] is similarly designed to enhance a state's ability to retain and/or attract the location of manufacturing or other corporate facilities in-state. These credits are generally intended to mitigate the tax increases (at least in the short run) that often result from the effect of in-state investment on a taxpayer's apportionment formula by virtue of increased in-state property and payroll. In short, the Ohio income tax incentive is an integral part of state taxation and is consistent with the purpose of the Commerce Clause.

### B. The Court of Appeals' Decision Provides an Unworkable Rule.

The decisional standard that this Court articulated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, (1977)—namely, that a discriminatory tax incentive "*forecloses tax-neutral decisions*"—was misapplied by the Court of Appeals. While *Boston Stock Exchange* itself was correctly decided, the standard articulated in the decision is ambiguous, and as reflected in the underlying decision, can lead to wildly erroneous results without additional practical guidance on the standard's correct application. Even the Court of Appeals below articulated its unease with this standard; asserting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," the Court nevertheless found it possible to conclude that the Ohio investment tax credit has a "coercive" effect on taxpayers (*i.e.*, one that precludes tax-neutral decisions on the part of those taxpayers who might

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[6] *See, e.g.*, New York's recent adoption of single sales factor for income tax apportionment purposes effective 2008. N.Y. Tax Law § 210(3)(a)(10)(A)(iii) (2005).

qualify for the incentive). *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (6th Cir. 2005).

Nearly every business decision and investment involves tax consequences that are considered and influence the decision itself. So, for instance, a business decision concerning where to manufacture automobiles would necessarily involve consideration of material costs (including sales taxes, excise taxes and other transaction taxes), labor costs (including employment taxes), and facility costs (including property taxes and depreciation deductions for income tax purposes). No one would suggest that the tax provisions impacting these business decisions (e.g., generally imposed sales taxes, employment taxes and income taxes) are unconstitutional merely because they influence business decisions, and by definition, foreclose "tax-neutral decision making." Similarly, the Ohio tax credit does not unconstitutionally discriminate against interstate commerce.

Further, the "tax-neutral decision making" standard, as applied by the Court of Appeals, suffers from other defects. The Sixth Circuit found the Ohio investment tax credit "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state." *Cuno*, 386 F.3d at 743. Does the court's analysis mean that the investment tax credit would be constitutional, had the taxpayer not already been subject to Ohio franchise tax? It is clear, using the court's rationale, that a company without a preexisting Ohio franchise tax would not be "coerced" into expanding in Ohio as that taxpayer would not have existing Ohio tax liability to reduce. However, a taxpayer without a preexisting Ohio franchise tax liability may find Ohio's tax provision just as

attractive as a taxpayer with a preexisting Ohio tax liability—in both cases, taxpayers would be seeking to avoid a tax associated with new activity—thereby undermining any justification for a different constitutional result.

This Court should ensure that its prior precedent is applied in such a way that permits states to encourage in-state investment provided the benefit is equally available to all and does not lead to tax increases on those that do not elect to participate.

## CONCLUSION

For the reasons stated above, *amici curiae* respectfully request the United States Supreme Court to accept this case for review.

Respectfully submitted,

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